



**THE ATTORNEY GENERAL
OF TEXAS**

February 29, 1988

**JIM MATTOX
ATTORNEY GENERAL**

Mr. R. E. Stotzer, Jr.
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State Department of Highways
and Public Transportation
11th & Brazos
Austin, Texas 78701-2483

Open Records Decision No. 489

Re: Whether the subscriber
mailing list of the Texas
Highways magazine is sub-
ject to required public
disclosure under the Texas
Open Records Act, article
6252-17a, V.T.C.S.
(RQ-1266)

Dear Mr. Stotzer:

The Texas Department of Highways and Public Transportation received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for its Texas Highways magazine subscriber mailing list. You indicate that, in the past, the department has furnished the subscriber list to requesting parties, charging only the costs authorized under the Open Records Act. You ask three questions about the release of this list: (1) whether the names on the subscriber mailing list are constitutionally protected from disclosure under section 3(a)(1) of the Open Records Act; (2) if the list is protected under section 3(a)(1), whether this prevents its release to another arm of the state; and (3) whether the Open Records Act prevents the department from charging the "market price" for the list rather than the actual cost of providing it.

You inquire about the privacy rights both of non-recipient subscribers (those who give gift subscriptions) and of actual recipients. Section 3(a)(1) protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You note that in Open Records Decision No. 100 (1975), this office held that the constitutional privacy aspect of section 3(a)(1) protects library circulation records that identify the reading habits of borrowers. You suggest that this protection might not extend to the names and addresses of persons who are non-recipient subscribers to Texas Highways magazine.

Open Records Decision No. 100 relied on a long series of United States Supreme Court cases protecting, through privacy, various rights to receive or review information without government interference. See, e.g., Stanley v. Georgia, 394 U.S. 557 (1969) (right to view pornographic film in privacy of home); Lamont v. Postmaster General, 381 U.S. 301 (1965) (right to receive controversial mail without written request to post office to deliver it). Although not specified in the federal Constitution, the Supreme Court recognizes the individual's right to be free from unwanted governmental intrusion as a fundamental constitutional right rooted in the penumbra of various specific constitutional provisions. See Stanley v. Georgia, supra. Open Records Decision No. 100 states:

If by virtue of the First and Fourteenth Amendment, 'a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch,' Stanley v. Georgia, supra at 565, then neither does the state have any business telling that man's neighbor what book or picture he has checked out of the public library to read or view in the privacy of his home.

The decision relied on the "chilling effect" that distribution of the information might have.

The weight of authority, however, is that neither constitutional nor common-law privacy protects either non-recipient subscribers or subscribers from the sale of mailing lists for advertising purposes even when the mailing lists reveal certain personal characteristics about the individuals. In Shibley v. Time, Inc., 341 N.E.2d 337, 339 (Ohio Ct. App. 1975), the court stated, "The right of privacy does not extend to the mailbox and therefore it is constitutionally permissible to sell subscription lists to direct mail advertisers." In Lamont v. Commissioner of Motor Vehicles, 269 F.Supp. 880 (J.D.N.Y. 1967), aff'd, 386 F.2d 449 (2nd Cir. 1967), cert. denied, 391 U.S. 915 (1968), the court rejected a constitutional challenge to a New York statute authorizing the sale of motor vehicle registration records. The claimants objected that they were legally required to register their motor vehicles and should not be subjected, as a consequence of such registration, to a flood of unsolicited advertisements. 269 F.Supp. at 882. The court stated:

The mail box, however noxious its advertising contents . . . , is hardly the kind of

enclave that requires constitutional defense to protect 'the privacies of life.' The short, though regular, journey from mailbox to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.

269 F.Supp. at 883. The court relied, in part, on Public Utilities Commission v. Pollak, 343 U.S. 451 (1952), in which the Supreme Court rejected the claim that the constitutional right of privacy protects captive audiences in public buses and streetcars from radio broadcasts.

In Falk v. State Bar of Michigan, 305 N.W.2d 201, 239-40 (Mich. 1981), the Michigan Supreme Court held that the constitutional right of privacy allows addressees to strike their names from the mailing list sold by the State Bar to commercial advertisers. The court relied on dicta in Rowan v. United States Post Office Department, 397 U.S. 728 (1970). In Rowan, the Supreme Court upheld a federal statute that grants recipients of unsolicited, sexually provocative advertisements the right to have the Postal Service direct the sender to refrain from further mailings. See 39 U.S.C. §3008 (recodification of 39 U.S.C. §4009). The court held that the First Amendment to the United States Constitution does not grant an unlimited right to send information and that the sender's rights must be balanced against the recipient's right to be left alone. 397 U.S. at 736-38. In Falk the Michigan Supreme Court stated, "The Supreme Court expanded this power [to be left alone], if only by dicta, to allow the addressee to strike his name from any mailing list." 305 N.W.2d at 240. The Supreme Court addressed only the validity of a statutory right to stop mail, however, and the Michigan Supreme Court read the Rowan court's dicta very expansively. Consequently, the Falk decision does not provide a solid basis for concluding that the constitutional privacy aspect of section 3(a)(1) of the Open Records Act protects the Texas Highways magazine subscriber mailing list.

Moreover, the Falk decision did not address the privacy question from the standpoint of compliance with a state's open records laws. Assuming that privacy does reach the mailbox, this right must be balanced with a statute expressly making information public. A recent opinion of the Florida Attorney General indicates that the name and address of subscribers to the Florida Game and Fresh Water Fish Commissioner's magazine could not be withheld under Florida's public records statute without

express statutory authority.¹ Fla. Att'y Gen. Op. 085-3 (1985). The Texas Open Records Act requires a similar construction because information is protected only if it falls within one of the act's specific exceptions to disclosure. See Open Records Decision No. 280 (1981); see also Attorney General Opinion JM-830 (1987). Although section 3(a)(1) of the act protects information deemed confidential by statute, no statute protects a state agency's mailing list from required public disclosure.

The privacy cases discussed previously focus on the scope of a constitutional privacy right not to receive unwanted information. Because of your reliance on Open Records Decision No. 100, your concern appears to focus on the information revealed through the sale of your mailing list. In specific, your argument is that the fact that a person receives Texas Highways magazine is constitutionally protected. Although there might be items or publications mailed to consumers that trigger constitutional privacy, the fact that an individual receives Texas Highways magazine is not constitutionally protected. This fact is not related to one of the constitutional "zones of privacy." See Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 687 (Tex. 1976), cert. denied, 430 U.S. 931 (1977) (relying on Roe v. Wade, 410 U.S. 113 (1973) and Paul v. Davis, 424 U.S. 693 (1976)). Nor does the fact that an individual receives Texas Highways magazine involve 'the most intimate aspects of human affairs'. See Open Records Decision No. 455 (1987) (discussing Fadio v. Coon, 633 F.2d 1172 (5th Cir. 1981)).

Section 3(a)(1) also encompasses common-law privacy. In Shibley v. Time, Inc., 341 N.E.2d 337 (Ohio Ct. App. 1975), the court rejected a claim that selling subscription lists to direct mail advertisers violated the recipients' common-law privacy interests. Common-law privacy protects four areas: (1) appropriation or commercial exploitation of the property value of one's name or likeness; (2) intrusion or invasion into one's physical

1. The opinion noted that a provision of the Federal Privacy Act that protects mailing lists applies only to federal agencies. See also Attorney General Opinion MW-95 (1979) (neither the Federal Freedom of Information Act nor the Federal Privacy Act applies to records held by state agency or political subdivision).

solitude; (3) public disclosure of private facts; and (4) false light in the public eye. See Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d at 687. In Shibley the court rejected the privacy claim, specifically rejecting the argument that the sale of mailing lists amounts to an appropriation of individual personal profiles. 341 N.E.2d at 339-40.

Because section 3(a)(1) of the Open Records Act does not protect the Texas Highways magazine subscriber mailing list, your second question is moot. Your third question is whether the Open Records Act prevents the department from charging the "market price" for the list.

Subsections 9(a) and 9(b), respectively, govern the cost of reproductions of standard-sized records and of access to records stored in non-standard forms:

(a) The cost to any person requesting noncertified photographic reproductions of public records comprised of pages up to legal size shall not be excessive. The State Board of Control shall from time to time determine the actual cost of standard size reproductions and shall periodically publish these cost figures for use by agencies in determining charges to be made pursuant to this Act. The cost of obtaining a standard or legal size photographic reproduction shall be in an amount that reasonably includes all costs related to reproducing the record, including costs of materials, labor, and overhead unless the request is for 50 pages or less of readily available information.

(b) Charges made for access to public records comprised in any form other than up to standard sized pages or in computer record banks, microfilm records, or other similar record keeping systems, shall be set upon consultation between the custodian of the records and the State Board of Control, giving due consideration to the expenses involved in providing the public records making every effort to match the charges with the actual cost of providing the records. The costs of providing the record shall be in an amount that reasonably includes all costs related to providing the

record, including costs of materials, labor, and overhead. (Emphasis added.)

These provisions authorize the department to charge requestors the "market price" for the department's subscriber mailing list only if the market price approximates the actual cost of providing the records. The courts interpret fee statutes strictly and do not permit the imposition of fees by implication. Moore v. Sheppard, 192 S.W.2d 559, 561 (Tex. 1946); Nueces County v. Currington, 162 S.W.2d 687, 688 (Tex. 1942). No statute expressly authorizes the department to charge more for its subscriber lists than the actual costs authorized in section 9 of the Open Records Act. Consequently, the department may not charge the market price for the Texas Highways magazine subscriber mailing list if the market price exceeds the actual cost of providing the records. Cf. Fla. Att'y Gen. Op. 085-3 (1985).

S U M M A R Y

Section 3(a)(1) of the Texas Open Records Act, article 6252-17a, V.T.C.S., does not protect from required disclosure the Texas Department of Highways and Public Transportation's Texas Highways magazine subscriber mailing list, either for recipients or for non-recipients. No statute expressly authorizes the department to charge more for its subscriber list than the "actual costs" authorized in section 9 of the Open Records Act.

Very truly yours,



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